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5                   UNITED STATES DISTRICT COURT  
6                   WESTERN DISTRICT OF WASHINGTON  
7                   AT SEATTLE

8                   KERRY and MICHAEL WASHBURN,  
9                   Plaintiffs,

10                  v.  
11                  GYMBOREE RETAIL STORES, INC., *et*  
12                  al.,  
13                  Defendants.

14                   Case No. C11-822RSL

15                   ORDER GRANTING IN PART  
16                   PLAINTIFFS' MOTION IN LIMINE

17                  This matter comes before the Court on Plaintiff's motion in limine (Dkt. # 81).  
18                  At the outset, the Court notes its displeasure with Plaintiffs' counsel's failure to adhere  
19                  to the baseline requirement of meeting and conferring with opposing counsel prior to  
20                  filing his motion. See Local Civil Rule 7(d)(4). The Court's patience with counsel's  
21                  missteps, e.g., Dkt. # 87, is wearing thin. Nevertheless, the Court DENIES Defendants'  
22                  request that it strike Plaintiffs' motion, Dkt. # 83, and finds as follows:

- 23                  1. The Court GRANTS Plaintiffs' unopposed request "that non-party witnesses  
24                  be excluded until after they testify," Dkt. # 81 at 2, with the exception that parties and  
25                  party representatives will not be excluded. See Fed. R. Evid. 615.
- 26                  2. The Court GRANTS Plaintiffs' unopposed request to exclude any evidence of  
settlement discussions or offers to the extent precluded by Federal Rule of Evidence 408.
- 27                  3. The Court DENIES Plaintiffs' request that Defendant Gymboree identify at

1 this time who, if anyone, will be serving as their corporate representative at trial.  
 2 Though admittedly less than clear, it appears Plaintiffs wish to know if Mr. Shanahan  
 3 will be the designated representative. Dkt. # 81 at 2 (“Gymboree need simply state  
 4 definitively whether Mr. Shanahan will be attending trial.”). Assuming that is the case,  
 5 the Court notes that they are free to subpoena him to ensure that he is available to call as  
 6 a witness at trial.

7       4. The Court GRANTS Plaintiffs’ unopposed request that the Court exclude  
 8 Defendants’ expert, Dr. Brooke Thorner, from testifying as to subjects not disclosed in  
 9 her expert report. See Fed. R. Civ. P. 26(a)(2)(B)(i); Dkt. # 83 at 3. It DENIES the  
 10 remainder of Plaintiffs’ requests regarding Dr. Thorner. Dkt. # 81 at 4–7. Dr. Thorner  
 11 will be permitted to testify as to her opinion that Ms. Washburn’s depression pre-dated  
 12 the conduct at issue in this case and how it may have contributed to her negative  
 13 perception of events at issue in this case. She will also be permitted to testify as to her  
 14 expert opinion concerning what effect other unrelated stressors may have had.<sup>1</sup> Plaintiffs  
 15 are free to renew their objection on a more specific basis as evidence is offered at trial.

16       5. The Court DENIES Plaintiffs’ request that it exclude inquiry or evidence of  
 17 possible other stressors in Ms. Washburn’s life, see, e.g., Dkt. # 83 at 7, or any inquiry  
 18 into the effect of past sexual abuse on Ms. Washburn’s state of mind. Dkt. # 81 at 7–9.  
 19 Ms. Washburn has clearly put these stressors at issue by asserting that her condition was  
 20 “exacerbated and worsened” by the stress of Defendants’ actions. See Amended  
 21 Complaint (Dkt. # 42) at ¶ 2.7 (“They subjected Kerry Washburn to a hostile work

22       <sup>1</sup> The Court disagrees with Plaintiffs’ assertion that this amounts to an expert opinion as  
 23 to credibility. Cf. United States v. Barnard, 490 F.2d 907, 912–13 (9th Cir. 1973). The Court  
 24 also notes that Plaintiffs do not raise a Daubert challenge. To the contrary, apart from their  
 25 credibility-testimony contention, they concede that Dr. Thorner is qualified to testify as an expert  
 on the issue of Ms. Washburn’s psychological condition. See Dkt. # 81 at 7 (“Here, Dr. Thorner  
 should be allowed to testify to her opinion that Kerry suffered from Depression and that it was  
 greatest during the period of late 2009 through 2010.”).

1 environment based on her MS, a physical condition, and retaliated against her for  
2 engaging in the Protected Activity of requesting protected leave. The conduct was  
3 severe and pervasive. It materially altered the conditions of Kerry Washburn's work  
4 environment. It exacerbated and worsened her MS as mental and emotional stress give  
5 rise to medical complications with MS." (emphasis added)). They are plainly relevant,  
6 Fed. R. Evid. 401, and thus generally admissible, Fed. R. Evid. 402. The Court will  
7 consider Plaintiffs' contention that certain inquiries may go "too far," and should  
8 therefore be excluded pursuant to Federal Rule of Evidence 403, and that specific  
9 inquiry is prohibited by RCW 9A.44.020 on an objection-by-objection basis at trial.<sup>2</sup>

10       6. The Court DENIES Plaintiffs' speculative request to exclude evidence "[t]o  
11 the extent documents or other matters exist which have not been produced to date." Dkt.  
12 # 81 at 9. Again, the Court will rule on specific objections to specific evidence as they  
13 are raised at trial.

14                     DATED this 7th day of September, 2012.

15                     

16                     Robert S. Lasnik  
17                     United States District Judge

24                     <sup>2</sup> The Court notes that Washington's Rape Shield Law precludes evidence of a "victim's  
25 past sexual behavior" only if offered on the issues of credibility or consent. RCW 9A.44.020(2).